IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

I. ELIZABETH REESE, Plaintiff	:	CIVIL ACTION
v.	:	
THE READING HOSPITAL AND MEDICAL CENTER, Defendant	:	NO. 96-7147

MEMORANDUM AND ORDER

I. INTRODUCTION

Plaintiff, I. Elizabeth Reese, brought the instant action against defendant, The Reading Hospital and Medical Center, under the Civil Rights Act of 1871 and 42 U.S.C. §§ 2000(e)(2) and 2000(e)(3)(a) (1994), for alleged acts of race and age discrimination and unlawful retaliation against her for complaining of discriminatory treatment. Defendant has filed a Motion for Summary Judgment. For the reasons which follow, I will GRANT the Motion.[1]

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[1] Plaintiff also named Valerie Diefenderfer, Supervisor of Radiology Transcription, as a defendant in this action. Ms. Diefenderfer has submitted a Motion to Dismiss and, for the same reasons applying to the claim against defendant Reading Hospital, the claim against her is dismissed.

However, because Ms. Diefenderfer was never properly served in this matter, the claim against her fails for another reason. Fed. R. Civ. P. 4(m) states that:

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

If good cause is not present, the district court can either dismiss without prejudice or extend time for service. Petrucelli v. Bohringer and Ratzinger, GMBH, 46 F.3d 1298, 1305 (3d Cir. 1995). The existence of good cause has

II. FACTS AND HISTORY[2]

On September 12, 1988, plaintiff I. Elizabeth Reese was hired as a Secretary I and assigned as a medical transcriber in the Radiology Department of Reading Hospital. In this position, she was required to transcribe reports regarding procedures such as fetal and obstetric ultrasounds, x-rays, mammograms, MRIs, CAT scans, angiography, nuclear medicine and peripheral vascular lab. Additionally, she was to answer telephone calls, follow up on requests made by telephone, and perform routine clerical work, including report distribution and typing. Rapid and accurate transcription capabilities, as well as knowledge of the procedures and workflow of the Department was of critical importance to the position.

To deal more efficiently with its workload, the Radiology Department introduced a new transcription system, entitled RADLAN, which enabled transcribers to upgrade their proficiency from ninety or more lines per hour to two hundred lines or more per hour. As a result, the minimum speed requirement for transcribers was raised to 100 lines per hour for employees with six months to one year experience. In January of 1994, the Hospital raised the minimum level again to 125 lines per hour.

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never been argued in any form by plaintiff and defendant presents substantial legal authority showing that good cause is not present. Because trial is set to begin November 7, an extension of time at this juncture is not appropriate, the Complaint against Ms. Diefenderfer must be dismissed.

[2] Because plaintiff's counsel failed to file a response to the Motion for Summary Judgment, the factual history is compiled from a review of the Complaint, Answer and defendant's Motion for Summary Judgment.

Because these levels are the lowest limits, though, transcribers are expected to gain proficiency with experience and improve their speed. Defendant Valerie Diefenderfer, Supervisor Radiology Transcription, meets with each transcriber annually to set his/her new goal for the year.

While attaining a satisfactory standard of accuracy, Ms. Reese consistently fell short of the minimum lines per hour requirement. Furthermore, the Hospital alleges that her lack of understanding of the new system and office procedures often led to costly mistakes such as double billing and misrouting of reports. Ms. Reese sought assistance from others on numerous occasions. Defendant placed Ms. Reese on probation on June 7, 1993 due to her poor performance in both her transcription and her office duties.[3] As such, she was monitored on a monthly basis by Ms. Diefenderfer and given feedback and assistance as needed. This probation period lasted a total of nine months.[4]

At the end of that time, in March 1994, Ms. Reese had still failed to steadily achieve the 100 lines per hour minimum transcription and still could not handle the routine office tasks. To discuss this situation, Ms. Diefenderfer, Robert Myers, Director of Personnel, and Beverly Stoudt, Administrative Manager, Radiology, met with Ms. Reese on March 3, 1994. As an

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[3] Defendants allege that the purpose of this probationary period was to give the plaintiff enough assistance and feedback to become a "minimally self-proficient employee." Motion at 3-4.

[4] Defendant states that the probationary periods at the Hospital are typically designed to last no more than six months.

alternative to resignation, they offered her the following three options: (1) transfer to an evening shift (with a 10% shift differential) as a transcriptionist in the Radiology Department for a temporary period and continue on probation[5]; (2) transfer to a clerical position in the front office; or (3) transfer to a clerical position in the file room. Failure to choose one of these options would be considered a resignation.

When Ms. Stoudt and Ms. Diefenderfer met again with Ms. Reese on March 8, Ms. Reese declined all of the options and said that she would not apply for any other open position. Consequently, her employment with Reading Hospital ended.

From this date of termination to August of 1994, Ms. Reese continued to work part-time at Berks ENT, a job which she held during her employment with Reading Hospital. Between April and November of 1994 she worked through the Job Service, but only applied for positions at three places. From November 1994 to May 1995, Ms. Reese was unable to continue her job search because of a knee injury and operation. Following her recovery in May to February 1996, she elected not to search for work because she wanted to care for her husband who had just undergone a second heart attack. Between February 28, 1996 and July 25, 1997 she babysat her granddaughter. At present, she is not working and is not seeking employment.

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[5] Defendant claims that this option was offered so that she could continue to improve her transcription speed without the distractions of the day shift.

III. LEGAL STANDARD

Fed. R. Civ. P. 56(c) permits a case to be dismissed under a grant of summary judgment.[6] A motion for summary judgment is appropriate only when there is no genuine issue of material fact, and one party is entitled to judgment as a matter of law. Williams v. Borough of West Chester, 891 F.2d 458, 463-64 (3d Cir. 1989). In such a motion, the court may examine evidence beyond the pleadings. The court must always consider the evidence, and the inferences from it, in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Tigg Corp. v. Dow Corning Corp., 822 F.2d 358, 361 (3d Cir. 1987); Baker v. Lukens Steel Co., 793 F.2d 509, 511 (3d Cir. 1986). If a conflict arises between the evidence presented by both sides, the court must accept as true the allegations of the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). This standard is applied with added rigor in employment discrimination cases, where intent and credibility are crucial issues. Stewart v. Rutgers, The State University, 120 F.3d 426, 431 (3d Cir. 1997) (citations omitted). For a dispute to be "genuine", a reasonable fact finder must be able to return a verdict (or render a decision) in favor of the non-moving party. Anderson, 477 U.S. at 24.

Notably, however, Fed. R. Civ. P. 56(e) states:

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[6] Fed. R. Civ. P. 56(c) states: The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

See Roa v. City of Bethlehem, 782 F.Supp. 1008, 1014 (E.D.Pa.1991)(A party resisting a motion for summary judgment must specifically identify evidence of record which supports her claim and upon which a verdict in her favor may be based.). With respect to an issue on which the non-moving party has the burden of proof, the burden on the moving party may be discharged by "showing"--that is, pointing out to the district court-- that there is an absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

IV. DISCUSSION

A. AGE AND RACE DISCRIMINATION

Plaintiff, in the instant matter, alleges age and race discrimination on the part of her employer, defendant Reading Hospital. Under the seminal case of McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), an employee must first present a prima facie case by establishing that (1) she is a member of a protected class[7]; (2) she is qualified for the position in

[7] In age discrimination claims, a member of the protected class would be a person over 40 years of age. Sempier v. Johnson & Higgins, 45 F.3d 724, 728 (3d Cir. 1995) cert. denied, Johnson & Higgins v. Sempier, 515 U.S. 1159 (1995).

question; (3) she suffered from an adverse employment decision; and (4) similarly situated individuals outside the protected category were treated more favorably.[8] Id. After an employee has established a prima facie case, a presumption of discriminatory intent by the defendant-employer is created. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). The burden then shifts to the employer to produce evidence that the adverse employment action was taken "for a legitimate, nondiscriminatory reason." Id. If the employer's evidence creates a genuine issue of fact, the presumption of discrimination drops from the case. Burdine, 450 U.S. at 260; Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 522 (3d Cir. 1992), cert. denied, 516 U.S. 826 (1993). The burden then falls upon the plaintiff to prove that the "employer's proffered reason [for the employment action] was not the true reason for the ... decision" but was instead pretextual. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 508 (1993).

Consequently, the first step in the instant matter requires this court to assess whether plaintiff has established a prima facie case by analyzing the uncontroverted evidence under the McDonnell-Douglas four-part test and viewing it in the light most favorable to the plaintiff.

(1) Prong Two

[8] Age discrimination requires a showing that the plaintiff's replacement was sufficiently younger to permit a reasonable inference of age discrimination. Sempier, 45 F.3d at 728.

Defendant first disputes plaintiff's claim that she was qualified for the position in question.[9] To make this determination, the court must examine objective job qualifications, while leaving consideration of subjective evaluations to the later stage of the McDonnell-Douglas analysis. Weldon v. Kraft, 896 F.2d 793, 798 (3d Cir. 1990). Plaintiff must raise a genuine issue of fact as to his/her qualifications for the position. Watson v. Salem 934 F.2d 643, 654 (D. NJ 1995).

In the case at bar, plaintiff simply could not meet the objective requirements of her job. According to defendant's evidence, all transcriptionists were to have the ability to transcribe at a certain minimum rate and to perform other office tasks. Affidavit of Valerie Diefenderfer, at ¶¶4,8 Plaintiff contended in her deposition that when she was hired, she was hired as a slower, but extremely accurate, typist. Deposition of I. Elizabeth Reese, July 30, 1997 at 139. Assuming this statement to be true, plaintiff's qualification still does not constitute a question of material fact. Her supervisor, Val Diefenderfer, stated in her affidavit that plaintiff could not perform basic office procedures and continually had to be retrained. Aff. of Valerie Diefenderfer, at ¶¶5,9,18. As such, plaintiff was put on probation for an extended nine month period.

[9] Note that there is no question, and defendant does not dispute, that plaintiff was part of a protected class under prong one both as an African-American and as a person over the age of 40.

Id. at ¶¶20,21 and Reese Deposition Attachment 9. Additionally, Ms. Diefenderfer explained that, although new, generally-applicable standards would have required plaintiff, an employee with well over a year experience, to be transcribing at a minimum rate of 125 lines an hour, her minimum goal remained 100 lines per hour for a temporary period. Aff. of Valerie Diefenderfer, at ¶23. Documentation maintained by the defendant shows that, despite this special, preferential treatment, plaintiff still could not attain a 100 lines per hour minimum on a consistent basis and only once did she reach the 125 lines per hour standard. Diefenderfer Aff. Attachments. After her nine month probationary period, it was more than obvious to her employer that she was not qualified for her position.

To rebut this evidence, plaintiff's obligation under Fed. R. Civ. P. 56(e) is to set forth specific facts by affidavits, documents or other sworn testimony that would establish, as an issue of material fact, her qualifications for the position in question. Her failure to do so, results in her inability to satisfy this prong of the McDonnell-Douglas framework.

(2) Prong Three

Defendant's second contention states that plaintiff failed to demonstrate that she was subjected to any "adverse employment action" as that term is used in the McDonnell-Douglas analysis.

The Third Circuit noted that conduct must be "serious and tangible enough to alter an employee's compensation, terms, conditions or privileges of employment to be adverse employment

action." Robinson v. Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1991).[10] Such an analysis is often performed under the "constructive discharge" doctrine. A plaintiff has been constructively discharged if "the conduct complained of would have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee's shoes would resign." Goss v. Exxon Office Systems Co., 747 F.2d 885 (3d Cir.1984). While a "constructive discharge" may in fact be adequate conduct to support a discrimination claim, "a reordering of the responsibilities of employees, without more, is insufficient to support a finding of constructive discharge." Spangle v. Valley Forge Sewer Auth., 668 F. Sup. 430, 433 (E.D. Pa. 1987) aff'd, 839 F.2d 171 (3d Cir. 1988).

Several cases within this Circuit have found that merely reassigning an employee to a different position does not constitute adverse employment action. In Vogel v. Honeywell, 1989 WL 48074 *5 (E.D. Pa., May 5, 1989), aff'd 888 F.2d 1383 (3d Cir. 1989), this Court held that an employee who was removed from one position, but offered another job with the same salary, benefits, salary grade and reporting level as his old position was not subject to adverse employment action. Similarly, in Kantner v. U.S. Postal Service, 1988 WL 100804 (E.D.Pa. Sept. 26,

[10] Although Robinson, was a retaliation case, the court said that "the 'adverse employment action' element of a retaliation plaintiff's prima facie case incorporates the same requirement that the retaliatory conduct rise to the level of a violation of 42 U.S.C. §2000e(2)(a)(1) or (2).

1988), this Court concluded that reassigning an employee to a different position where she had no desk or telephone and was given "idiot work" could not be considered adverse employment action. See also Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996)("Obviously a purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action. A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either.").[11]

In the case at bar, plaintiff has not identified any adverse employment action to which she was subject. Upon failing to make any improvements in her work performance, she met with Robert Myers, the Director of Personnel, Val Diefenderfer, Supervisor of Radiology Transcription and Beverly Stoudt, Administrative Manager, Radiology. In that meeting, she was offered three options: (1) transfer to an evening shift (with a 10% shift differential) as a transcriptionist in the Radiology Department for a temporary period and continue on probation; (2) transfer to a clerical position in the front office; or (3) transfer to a clerical position in the file room. Affidavit of Robert M. Myers, at ¶¶3,4. While the second two options would result in a

[11] Notably, transfers that would result in a decrease in earnings or a serious demotion could constitute materially adverse employment action. See e.g., Goss v. Exxon Office Systems Co., 747 F.2d 885 (3d Cir.1984) (transfer of a saleswoman who worked on commission to an inferior region was materially adverse; Collins v. Illinois, 830 F.2d 692, 704 (7th Cir.1987)(lateral transfer was really a demotion and, hence, was materially adverse).

pay cut, the first option offered an increase in salary. She was also told that she could apply for any other job within the Hospital for which she was qualified. Failure to accept any of the options would be deemed a resignation. Feeling that "she had struggled too hard to learn [her current] job" decided to elect none of the options. Deposition of I. Elizabeth Reese, July 30, 1997, at 45. Nothing in the evidence before this Court demonstrates that the first option offered would constitute adverse employment action or constructive discharge under the established precedent. It provided a pay raise and a chance for her to improve her transcription speed. Without at least a minimal showing to the contrary, plaintiff cannot create a genuine issue of material fact on this prong of the McDonnell-Douglas test.

(3) Prong Four

Finally, defendant claims that plaintiff cannot, under prong four of the McDonnell-Douglas framework, point to similarly situated individuals outside the protected category who were treated more favorably. Plaintiff identified two other transcriptionists, Sarah Heck and Judy Rawlings, who were as slow as her, but suffered no "adverse employment action." Deposition of I. Elizabeth Reese, at 142.

Sarah Heck generally did work at a slower rate than plaintiff and was, in fact, below standard. Diefenderfer Attachments. However, as defendant correctly notes, Ms. Heck only worked at the Hospital for sixteen weeks and was, during

that time, allowed to perform at a substandard level. Motion for Summary Judgment, at 9. Therefore, she does not differ in any significant fashion from plaintiff, who was permitted to work below standard for at least her nine month probation period. Plaintiff does not identify any other differences in treatment between herself and Ms. Heck.

With respect to Judy Rawlings[12], the Hospital transcription records show that Ms. Rawlings, with several occasional exceptions, consistently met at least the minimum standard until January of 1994 when it was raised to 125 lines per hour. Diefenderfer Aff. Attachments. After that date she fell below the new standard only three times.[13] Id. Two important factors distinguish her from plaintiff. First, from July of 1992 to April of 1994, plaintiff only achieved the same or better number of lines of transcription as Ms. Rawlings three times. Second, Ms. Rawlings was not given any leeway with her transcribing and was expected to attain the 125 lines per hour minimum beginning in January 1994 - a standard which she successfully maintained. Hence, Ms. Rawlings cannot be deemed "similarly situated" to plaintiff who, more often than not, fell below her reduced minimum transcription level.

Because plaintiff has not adduced any evidence beyond the

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[12] Plaintiff asserts that Ms. Rawlings had 20 years consecutive transcription experience and thus distinguishes her. This point is irrelevant.

[13] Transcription records are only provided up to July 30, 1994.

allegations in the Complaint that would demonstrate (1) that she was qualified for the position in question; (2) that she suffered adverse employment action; and (3) that similarly situated individuals were treated more fairly - three of the four elements of a prima facie case - she has failed to demonstrate that a genuine issue of material fact is present. Although the moving party in a Motion for Summary Judgment bears the burden, the nonmoving party cannot simply rely on allegations in the pleadings to defeat the Motion. Plaintiff's counsel, however, has chosen to do just that by refusing to submit evidence or even file a response. Consequently, the Count One claim for discrimination must be dismissed on summary judgment.

B. HARASSMENT

The second part of Count One alleges a pattern of harassment against the plaintiff. To sustain a claim of age and race-based harassment, plaintiff must prove that she was subjected to intentional discrimination because of her race or age which was so severe or pervasive as to alter the conditions of her employment and create a working environment perceived by her and reasonably perceived by one of her age or gender as hostile or abusive. Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-22 (1993); Meritor Savings Bank v. Vinson, 47 U.S. 57, 67, 72 (1986); Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir.1990). The pertinent factors in determining whether a working environment is abusive or hostile include the severity and frequency of the conduct, whether such conduct is physically

threatening or humiliating or merely consists of some offensive utterance, and whether such conduct interferes unreasonably with plaintiff's work performance. Harris, 510 U.S. at 23.

In the case at bar, plaintiff identified, in her Complaint, several forms of harassment by her supervisor Val Diefenderfer including (1) assigning plaintiff to a noisy work area, (2) making daily changes in the work assignment and citing plaintiff for errors without justification, (3) making statements "that plaintiff should resign because she was too old to work," (4) penalizing plaintiff regarding her dictation despite plaintiff's performance being equal to other staff; (5) keeping a log book of plaintiff's activities and encouraging other employees to make derogatory statements about her; (6) changing the speed requirement for plaintiff's transcription rate constantly in order to put her on probation and eventually fire her; (7) training other employees on the new computer system first, but expecting plaintiff to perform at the same level as individuals with superior training. Complaint, at ¶11. While these allegations may in fact state a satisfactory claim of discriminatory harassment if presented through some sort of evidence and/or sworn testimony, plaintiff has simply not offered anything to this Court beyond these allegations to substantiate them. Defendant has properly pointed to this obvious absence of any evidence sufficient to create a genuine issue of material

fact.[14] Motion for Summary Judgment, at 12.

The only substantiated allegation regarding harassment is that plaintiff was placed on probation for nine months before being told she had to either accept one of the three other positions offered to her or resign. However, defendant has introduced uncontroverted evidence that plaintiff could not meet the minimum standards of transcription and could not perform routine clerical work. Affidavit of Valerie Diefenderfer, at ¶25 and Attachments. Intra-office memoranda, probationary reports and affidavits show that the probation period was designed to assist plaintiff in improving her skills rather than firing her automatically. Id. and Reese Dep. Attachments. Moreover, she was not fired at the end of her probation, but rather was offered other positions, including one that would pay more money. Nothing indicates that these actions were taken for harassment purposes. Resting on merely her Complaint, plaintiff cannot survive a Motion for Summary Judgment with respect to her harassment claim.

C. RETALIATION

[14] As noted above, Rule 56(e) of the Federal Rules of Civil Procedure requires that the non-moving party with the burden of proof on a dispositive issue at trial "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " Celotex, at 324. Rule 56 enables a party contending that there is no genuine dispute as to a specific, essential fact "to demand at least one sworn averment of that fact before the lengthy process of litigation continues." Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990) citing Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990).

Plaintiff's final allegation contends that she suffered retaliatory action upon reporting her claims to the Hospital. To establish discriminatory retaliation under Title VII, a plaintiff must demonstrate that: (1) she engaged in activity protected by Title VII; (2) the employer took an adverse employment action against her; and (3) there was a causal connection between her participation in the protected activity and the adverse employment action. Robinson v. Pittsburgh, 120 F.3d 1286, 1299 (3d Cir. 1997) citing Nelson v. Upsala College, 51 F.3d 383, 386 (3d Cir. 1995). "Not everything that makes an employee unhappy" qualifies as retaliation, for "[o]therwise, minor and even trivial employment actions that 'an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.' " Robinson, 120 F.3d at 1300 (citations omitted). Moreover, "the mere fact that adverse employment action occurs after a complaint will ordinarily be insufficient to satisfy the plaintiff's burden of demonstrating a causal link between the two events." Id. at 1302.

Once again plaintiff's claim staggers under the weight of the evidence against it. Plaintiff alleges in her Complaint that, after informing the Director of Personnel, Robert Myers, of the harassment and discrimination practices of her supervisor, Ms. Diefenderfer, she was placed on probation and terminated. However, plaintiff failed to create a genuine issue of material fact with respect to two elements of the retaliation claim. First, as discussed supra, plaintiff has not alleged any "adverse

employment action." In fact, defendant has established that she was offered three alternative employment options, one of which offered a higher salary, and was told that failure to accept one of these options would be deemed a resignation. Aff. of Robert Myers, at ¶¶4-6. Plaintiff's counsel has submitted nothing to counteract that evidence. Second, as defendant notes, plaintiff has created no issue as to a causal connection between her protected activity and any action taken by the Hospital. In her deposition, plaintiff stated that the treatment she received by Ms. Diefenderfer was "bad" both before and after she made the complaint to Mr. Myers, but did not indicate that the treatment became worse after she took her protected action. Deposition of I. Elizabeth Reese, September 16, 1997, at 63. Again, plaintiff points to absolutely nothing which would support any type of causal connection in the face of defendant's Motion. Because there is no genuine issue of material fact as to the existence of a retaliation claim, summary judgment must be granted.

V. CONCLUSION

For all of the foregoing reasons, plaintiff's Complaint against both defendant Reading Hospital and Valerie Diefenderfer is dismissed.

An appropriate order follows.